

(2005) 09 CAL CK 0039
In the Calcutta High Court

Case No : APO No. 438 of 2005, APOT No. 507 of 2005 and ACO No's. 128 of 2005

AVO Engineers (P) Ltd.

APPELLANT

Vs

India Ice Aerated Water and Cold Storage Co. Ltd.

RESPONDENT

Date of Decision : 19-09-2005

Acts Referred:

Companies Act, 1956 — Section 434

West Bengal Premises Tenancy Act, 1997 — Section 13, 17, 17(4A), 17(4B), 20

Citation : (2006) 2 CHN 384

Hon'ble Judges : Pinaki Chandra Ghose, J; Narayan Chandra Sil, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Pinaki Chandra Ghose, J.—The appeal is directed against an order dated May 4, 2005 passed by the Hon"ble Company Judge admitting the winding up petition and directed the appellant herein to make the payment at the enhanced rate in the terms of Section 17(4A) of the West Bengal Premises Tenancy Act, 1997 (hereinafter referred to as the said Act). It has further been directed that the company would go on making payment at the enhanced rate commencing from June, 2005 and the balance 50% of the arrear would be paid by the company by six equal monthly instalments payable within January, 2006. The petitioner was directed to file certain undertakings as would be evident from the order so passed by the Hon"ble First Court.

2. The interesting point has been taken before us by the learned Counsel appearing on behalf of the company that the company was never served with a notice u/s 20 of the said Act to enhance the rate in question. He further contended that no notice u/s 20 of the said Act was ever served upon the appellant by the landlord, the petitioning creditor/respondent herein. We directed the learned Senior Advocate appearing on behalf of the respondent to produce the said notice u/s 20 of the said Act before this Court showing the receipt

thereof by the company but the respondent failed to produce such notice u/s 20 of the said Act and to produce any document to show that it was served upon the appellant/company. Therefore, it is submitted it has been recorded in the order dated May 4, 2005 by His Lordship that "Landlord gave notice for increase of rent as permissible u/s 17(4A) of the West Bengal Premises Tenancy Act, (1977) 1997" is not a correct position on facts. Therefore, it was submitted that in fact no notice was served upon the company by the landlord excepting a notice u/s 434 of the Companies Act, 1956. According to the appellant, admittedly the appellant is a monthly tenant in respect of three separate tenancies under the respondent and a sum of Rs. 2288/-per month is payable by the appellant to the respondent per month in respect of those tenancies.

3. By the said notice u/s 434 of the Companies Act, 1956, respondent claimed a sum of Rs. 4,00,400/- from the company. It is submitted that enhancement of rent is not automatic even u/s 17(4A) of the said Act it has been specifically stated by the Legislators in the amending Act of 2002, which was published in Calcutta Gazette on 6th August, 2002 and it has been stated that it shall be deemed to have come into force on and from 10th July, 2001. The said Sections 17(4A) & 17(4B) of the said Act are reproduced hereunder:

17(4A). Where a tenancy subsists for twenty years or more in respect of the premises constructed in or before the year 1984 and used for commercial purpose, the fair rent shall be determined by adding to the rent as on 1.7.1976 five times or by accepting the existing rent if such rent is more than the increased rent determined under this Sub-section.

17(4B). Where a tenancy subsists for ten years or more but less than twenty years in respect of the premises constructed in or before the year 1984 and used for commercial purpose, the fair rent shall be determined by adding to the rent as on 1.7.1986 three times or by accepting the existing rent if such rent is more than the increased rent determined under this Sub-section.

4. Therefore, it is submitted on behalf of the appellant that the Legislators thought it is fit to be stated that the fair rent shall be determined by adding to the rent as on 1st July, 1976 five times or by accepting the existing rent if such rent is more than the increased rent determined under the said Sub-section. Therefore, it is submitted that no chance has been given to the appellant before the determination of enhanced rent, which is stated to be the fair rent by the Legislators under the said provisions of law. Hence, it is submitted that without serving a notice and without giving a chance to the tenant u/s 20 of the said Act, the Landlord has no right to get the benefit of fixation of fair rent automatically. Therefore, it is contended that in the absence of such notice there is a bona fide dispute as to whether any debt can be sought to be crystallized in favour of the Landlord and that the said ground of the company would be taken as a defence which is not sham or colourable and then the Court must give a chance of being heard to the appellant before admitting the winding up petition and the Court should have relegated the claim of the petitioning creditor to a suit. It is

submitted that the Court has wrongfully without taking the said part at all decided the matter and even without giving a chance to the company of being heard admitted the petition.

5. It is further submitted, after the said notice is served u/s 20 of the said Act claiming the enhanced rate any claim for enhanced rent for a period prior thereto cannot said to be a fair rent and u/s 13 of the said Act the tenant cannot be also held liable for the said payment. Therefore, in the instant case it is admitted that firstly no notice u/s 20 of the said Act was served and further the notice u/s 434 of the Companies Act, 1956 was served by the learned Advocate-on-Record to the company dated 4.6.2004 and the letter was duly replied by the learned Advocate on behalf of the appellant on 19th June, 2004. It was specifically stated in the reply that Section 17 of the said Act deals with fixation of fair rent and it is also stated that excepting the Controller the landlord has no authority to fix the amount u/s 17(4A) of the said Act and can raise a claim since July, 2001 till May, 2004. Therefore, it is submitted that a bona fide dispute was also raised by the company in their said reply.

6. Accordingly, it is submitted that the Court should not have directed to pay the rent at such enhanced rate since 2001. It is further submitted that the appellant company was only incorporated on 7th October, 2003 and certificate of incorporation was duly annexed to the affidavit-in-opposition of the company before the Hon'ble First Court (vide Certificate of Incorporation No. U50200WB2003PTC097087).

7. Therefore, it is submitted that such claim is totally wrongful on the part of the respondent. It was further submitted that the company was not liable to pay the liabilities of the erstwhile tenants. It is further submitted that even if it is taken into account that five times rent can be enhanced but it would be evident from the demand notice u/s 4,00,000/- which is frivolous for the following reasons:

The company came into existence in 7th October, 2003. The five times would be Rs. 2288 x 5 i.e. Rs. 11,400/-. Further, if we multiply the sum by ten months it would it would be only Rs. 1,14,400/- from February, 2004 till November, 2004 (since it has been stated that notice u/s 20 of the said Act was served in January, 2004, but in fact the respondent has failed to produce any document to prove the same).

8. Therefore, the claim of the respondent of Rs. 4,00,400/- in the winding up petition was frivolous and there is a bona fide dispute. It is further submitted that the Company Court had no jurisdiction to determine the fair rent. Accordingly, the said order is bad in the eye of law. It is submitted that on these grounds the said order should be set aside.

9. On the contrary, Mr. Chatterjee, learned Senior Advocate supplied that the company was liable to pay five times of the existing rent in view of Section 17(4A) of the said Act and he submitted that the appellant was to pay Rs. 11,440/- per month from July, 2001 till May, 2004. Therefore, the outstanding

rent from July, 2001 to May, 2004 is amounted to Rs. 4,00,400/-. He submitted that some of the tenants have already paid the enhanced rent. He further contended that the learned Advocate for the appellant contended before the Hon"ble First Court that there are certain grievances of the appellant and if such grievances are met then they have no objection in paying the enhanced rent. Accordingly, fifty per cent of the arrear amount was directed to be paid within January, 2006 in six equal monthly instalments commencing from June, 2005. Respondent was also directed to give undertaking to do certain things. Undertakings were filed before the Court, in time. He further contended that the rent is nothing but debt which is already accepted by the Court and relied upon a decision reported in 59 Company Cases 435 (In re: Siddhartha Apparels P. Ltd. In re: Biren Roy Trust). He further submitted that there is no bona fide dispute on the part of the tenant/company.

10. He submitted that by amending the said Act in 2002 Section 17(4A) and Section 17(4B) of the said Act were inserted by the Legislators and came into force on 10th July, 2001. Therefore, according to him, if notice was given in August, 2002, enhanced rent was to be received from September, 2002 as per the provisions contained in Section 20 of the said Act. Therefore, the landlord would be deprived of receiving enhanced rent from July, 2001 to August, 2002. That is the reason Section 17(4A) of the said Act was inserted by the said amending Act with an object to give benefits to the landlord to receive enhanced rent and further without serving any notice under the said Act. It is only the duty of the tenant to pay the said sum. He further submitted that golden rule of interpretation if followed it has to be accepted that Section 17(4A) of the said Act is a special provision while Section 20 of the said Act is a general provision, therefore. Section 17(4A) should prevail. He relied upon a decision reported in The J.K. Cotton Spinning and Weaving Mills Co. Ltd. Vs. The State of Uttar Pradesh and Others, . Apart from the above golden rule of harmonious construction it is submitted that the Court should interpret the provision by which the object of amendment is fulfilled. He has relied upon a decision reported in Krishan Kumar Vs. State of Rajasthan and others, and another decision reported in Sultana Begum Vs. Prem Chand Jain, .

11. We have analyzed the facts of this case and considered the decisions cited before us by the learned Counsel for the parties. It appears to us that there is a bona fide dispute raised by the appellant before the Hon"ble First Court. After scrutinizing the facts it appears to us that the Statement of Objects and Reasons to amend the West Bengal Premises Tenancy Act, 1997, duly stated in West Bengal Premises Tenancy (Amendment) Bill, 2002 and it would be evident from the said Bill that Section 17 of the said Act has been amended on the following objects and reasons which is reproduced hereunder:

6. To amend Section 17 of the said Act for fixation of fair rent in such a manner so as to provide benefit to both the landlord and tenant concerned.

12. Therefore, it is clear to us that the Legislators thought to give benefit to both

the tenant and to the landlord and in respect of fixation of fair rent and coming to a harmonious meaning to the said Act for fixation of fair rent we cannot shut our eyes that Section 17 of the said Act has been made for the purpose of fixation of fair rent and the jurisdiction was given to the Controller who has a right and the authority to fix the fair rent on an application to be made either by the landlord or by the tenant in the prescribed manner. It was specifically stated that the Controller shall fix the fair rent in respect of any premises in accordance with the provisions of this Act. Therefore, we cannot accept the contention of Mr. Chatterjee that without giving an opportunity to the tenant the fair rent can be determined by the landlord and that too without serving any notice u/s 20 of the said Act and further without giving a chance of being heard to the tenant. It has been specifically stated in the amended Act of 17(4A) and 17(4B) "that fair rent shall be determined". Therefore, it is the duty of the landlord to apply before the Controller for fixing the fair rent and without taking the burden on his shoulder to fix the same in accordance with the provisions of Section 17(4A) and Section 17(4B) of the said Act as contended before us. Therefore, in our opinion, it was the duty of the landlord to serve a notice u/s 20 of the said Act for enhancement of the rent and further it has to be settled by the Controller who only has a power to fix the fair rent and not by any other Court. Therefore, in our opinion, the company has raised a bona fide dispute in the matter in respect of the claim of the petitioning creditor, since in our opinion until the fair rent is fixed and/or determined by the Controller and there is a failure on the part of the tenant to pay it off the said amount cannot be treated as a "debt" which is due by the tenant to the landlord, therefore, following the principles laid down in *Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation*, we do not have any doubt in our mind to hold with respect to the Hon'ble First Court that the "debt" of the appellant was not crystallized at the time of presentation of the petition, in other words, we do not find any "debt" prevailing at the time of presentation of the winding up petition by the petitioning creditor and, therefore, the said petition ought to have been held as premature winding up petition. We further hold that for non-service of the notice u/s 20 of the said Act the claim of the petitioning creditor is also premature and therefore, in our opinion the winding up petition must fail on that ground also. Further we place it on record that there is a bar u/s 44 of the said Act of the Civil Court to fix the fair rent in respect of a tenancy. Hence, we have to hold that the Hon'ble First Court had no jurisdiction even to pass such order, as the fixation of fair rent was not determined by the Controller.

13. Accordingly, on the said reasoning we set aside the order so passed by the Hon'ble First Court as well as dismiss the winding up petition.

14. The appeal is thus allowed on the above terms.

Narayan Chandra Sil, J.

15. I agree.